

PP v. Datuk Haji Harun and Mohd Radhi bin Yaacob v. PP. a

The creditworthiness of the testimony of the prosecution witnesses could not be faulted by the Court. They have succeeded in building an absolutely overwhelming circumstantial case of exclusive possession, custody, control and knowledge of P3 to P10 against the accused, which the accused has not succeeded by testimony and D14, in raising a reasonable doubt to acquit himself.

For all the above reasons, I find the accused guilty as charged and I now pass the mandatory death sentence on him.

PUBLIC PROSECUTOR

v.

NASSER AGHAEI

HIGH COURT, SHAH ALAM

DATO' K.C. VOHRAH J.

[CRIMINAL TRIAL NO. 47-32-1992]

30 APRIL 1994

CRIMINAL PROCEDURE: Charge of trafficking in cannabis - Dangerous Drugs Act 1952 (Revised 1980) s. 39B(1)(a) - Burden of proof - Accused ordered to enter defence - Court doubtful whether accused was telling the truth - Whether accused could still be entitled to an acquittal.

The accused, an Iranian national, was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980) for trafficking in 978.53 grammes of cannabis resin at Gate 12, Terminal One, Subang International Airport. The offending item, as the evidence seemed to suggest, was recovered by the airport police from the inside pocket of a jacket which the accused was either wearing or carrying at the material time and place. In his defence the accused in effect said that the jacket belonged to another Iranian by the name of Ali Askari who asked him to hold the jacket when he (the said Ali Askari) went to the toilet. The existence or otherwise of Ali Askari, however, had never been proved.

There was no dispute to the fact that when asked by the security officer PW6 as to the content of the jacket the accused answered "My freind! My freind!". The accused however contended that what he actually said to PW 6 was "I don't", meaning that he did not know, and also "My freind! My freind! Just a moment", meaning that the jacket belonged to his freind and that he wanted the police to give him a moment to bring his freind. Apparently what transpired at the scene was recorded by a video camera stationed at Gate 12 but there was no evidence to show that someone had in fact seen the video tape or that the incident had in fact been so recorded. In any event the monitor tape on that day had been destroyed during a fire which occurred on 15 October 1992.

The main issue was whether the defence as pleaded by the accused had raised a reasonable doubt in the case for the prosecution.

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Held:

[1] There were disquieting discrepancies in the evidence of the prosecution. While there was no dispute that the accused said "My freind! My freind!" there was a dispute whether the accused also said "I don't" before he said "My freind! My freind! Just a moment". There was also evidence that the accused was physically examined while he was still wearing the jacket and it is thus difficult to see why the physical examination of the person, which must have taken a few seconds, did not extend to the jacket while he was wearing it. It is also unfortunate that, assuming the search was recorded on the master video tape, that tape is not available to verify what occurred on that day. Bearing all these factors in mind, there is a reasonable doubt as to whether the accused was at all wearing the jacket at the material time.

[2] The question revolving on Ali Askari had not been resolved. The facts showed that there is no evidence that the accused identified each and every passenger on that flight. True that the accused did say in his cautioned statement that after his arrest he was brought to the examination place by an officer and there the officers asked the passengers who wanted to board the plane whether they knew the accused but no one said he knew him. This evidence did not mean much as the Court is not aware if other passengers had not already boarded the plane before the passengers in the room were asked to identify the accused, and there was no prosecution evidence to that effect. These apart, there was also no evidence to show that no other Iranian passenger had come after the accused to be checked at Gate 12.

[3] Although there was some doubt whether the accused was telling the truth when he gave his version of what had occurred, the burden of proof is nevertheless always on the prosecution and the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. On the facts the Court is not prepared to say that the explanation of the accused has not cast a reasonable doubt on the prosecution's case.

[Accused acquitted and discharged].

Cases referred to:

Khoo Hi Chiang v. Public Prosecutor [1994] 1 MLJ 265

Mohamad Radhi b. Yaakob v. Public Prosecutor [1991] 3 MLJ 169

a Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(da)(vii), 39B(1)(a), (2)

For the public prosecutor - Baizura bt Kamal, DPP
For the accused - Karpal Singh; M/s. Karpal Singh & Co.

b**JUDGMENT****K.C. Vohrah J:**

The accused, an Iranian national, was charged as follows:

c That you on 10 April 1992, at about 10.45 a.m. at Gate No. 12, Terminal One, Subang International Airport, in the District of Petaling Jaya, in the State of Selangor Darul Ehsan, did traffic in dangerous drug, to wit, 978.53 gram of Cannabis Resin, and you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80) punishable under s. 39B(2) of the same Act.

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The case for the prosecution was that on the date and time and place specified in the charge when security officer Corporal Jamalludin bin Ali (PW6) did a search of the jacket of the accused which he was wearing but which he had taken off for the search, PW1 felt something in the pocket area of the jacket. PW6 could not, however, find anything in the pocket. When PW6 asked the accused what was inside the pocket, the man said, "My friend! My friend!", left the jacket with PW6 and quickly walked away.

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He was subsequently detained and in his presence one Police Detective Sergeant Fan tore the lining of the inside of the jacket on the left side and discovered 3 packages, a plastic packet bound by cellophane tape containing a slab of black substance, a cloth bundle bound by cellophane tape containing 2 slabs and 18 smaller pieces of a black substance and another plastic packet containing a slab of black substance. All the substances were sent to the chemist. On analysis of the substances the chemist found some opium and 978.53 grammes of cannabis resin. Cannabis resin is a dangerous drug defined under s. 2 of the Dangerous Drugs Act 1952 (the Act).

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The evidence of PW6 was this. On 10 April 1992 at about 10.45 a.m. he was on duty at Subang International Airport at Gate 12. His duty, together with Security Woman Constable Hamisah, was to examine physically the passengers and their belongings for flight CX 720 bound for Hong Kong. He saw a man (the

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accused) wearing a black jacket (P12A) and holding a bag in his right hand approach the security check point. The accused placed the bag on a machine (he called it the X-ray machine) and he then walked through the metal detector frame. PW6 stopped the accused in order to carry out a physical examination on his person. The man at that stage took off his jacket and put it in his right hand. PW6 examined the jacket while PW6 held it and felt something in the area of the pocket of the jacket. PW6 examined the pocket but found nothing in it. He again felt the jacket at the area of the pocket and found that there was something there in that area. He then asked the man, the accused, in English, "What is inside the pocket?"

According to PW6 the accused said, "My friend! My friend!" The accused then quickly walked out of Gate 12 through the metal detector frame and PW1 lost sight of him. PW6 held the jacket and informed Sergeant Fan that a passenger had walked away and asked for his assistance to detain the person who he said was wearing a yellow shirt with black floral patterns.

Sergeant Fan (PW7) was on duty at Gate 12 with his team of 2 other Anti-Narcotics Divisions personnel in order to do spot checks on Iranian passengers. He also saw the accused approach the scanning machine and put his bag on the machine after which he walked through the metal detector frame. He saw PW6 examine him. He held a passport and a ticket in his left hand. He also said that "(when) Corporal Jamalludin wanted to examine the jacket, the accused took out his jacket which he was wearing and gave it to Corporal Jamalluddin." He also heard the accused say, "My friend! My friend!" He then saw the man turn back and walk through gate 12. Then Corporal Jamalluddin requested his help to detain the accused. He detailed Detective Constable Hamzah to look for the man who was wearing a yellow shirt with black floral patterns. Subsequently after getting some photographs from the bag which the accused had left at Gate 12, PW7 instructed Corporal Francis to look for the man shown in the photograph.

It has to be pointed out in this judgment that both Corporal Jamalluddin and Sergeant Fan disagreed under cross-examination that the accused had the jacket in his hand and was not wearing it when he approached the scanning machine. Corporal Jamalluddin also disagreed

a that after he questioned the accused as to what was in the pocket of the jacket the accused replied in broken English, "I don't! My friend! My friend! Just a moment!" instead of merely the words "My friend! My friend!" On the other hand Sergeant Fan agreed under cross-examination that the accused uttered all these words though under re-examination he resiled and said that the accused merely said, "My friend! My friend!"

c To resume the narration of the events leading to the accused's arrest, Detective Police Constable Hamzah Hassan (PW8) found the accused at the departure lounge near Gate 6 some 400 metres away from Gate 12. He identified him from the colour of the shirt he was wearing and detained him. He said that Corporal Francis then joined him at the departure lounge.

d PW8 said that he and Corporal Francis then brought the accused to Gate 12. The evidence of Sergeant Fan was that he tore the lining inside the left side of the jacket (P12A) in the presence of the accused and he found 3 bundles underneath the lining, a plastic packet bound by cellophane tape (P8A) containing a black substance (P8A), a two layer cloth bundle (P10A and B) containing several pieces of a substance (P10 C,D and E), and a plastic packet (P19B) bound by cellophane tape containing a black substance (P9C and D). He suspected all the substance to be opium.

f PW8 also said that he found some items of clothings and letters in the bag (P11) which the accused had left at Gate 12. Among the items of clothing was a yellow jacket (P11A).

g The evidence of the Government Chemist (PW5) was that the substances in the 3 packages recovered from the jacket were analysed by him and he found that the black substance, a slab, in P8A, was 352 grammes of cannabis resin.

h In the bundle comprising 2 pieces of cloth (P10 A and B) he found a piece of black substance wrapped in plastic which was 85.13 grammes of cannabis resin (P10C) and another piece of substance wrapped with plastic which was 34.28 grammes of cannabis resin (P10D) and 8 pieces of a blackish substance which comprised 47.12 grammes of cannabis resin. (P10E)

i In the other plastic packet bound by cellophane tape he found a plastic bag containing 2 slab of a black substance (P9C), the substance being

460 grammes of cannabis resin. There was another packet (P9D) containing 11.49 grammes of raw opium.

I am satisfied with the evidence of PW5 who was a chemist, who had considerable experience in the analysis of dangerous drugs that he did a proper analysis of the drugs and that the bulk of the substance in all the 3 bundles (except for the 11.49 grammes of raw opium) comprised 978.53 grammes of cannabis resin. From the evidence of the Investigating Officer of the case, Inspector Mohinder Singh and the evidence of all the personnel in charge of the store (PW1, PW2 and PW3) where the exhibits were kept, I am satisfied that the packages of black substances which were handed to the Government Chemist for analysis were the packages which were recovered from the jacket (P12A).

Another aspect of the case has to be mentioned here. Gate 12, according to PW11, on the day the arrest was made was fixed with a video camera to monitor persons in the area of Gate 12.

PW11, a security officer at the airport and supervisor for the Closed Circuit TV room in the airport, stated that the video camera ran 24 hours a day. There is no evidence, however, that someone did see the video tape or if the incident was recorded. In any event the monitor tape for that day was destroyed during a fire which occurred on 15 October 1992 which also involved the Closed Circuit TV Centre in Terminal 1 where the monitor tape was kept. This was the evidence of ASP Hanafiah who investigated the fire.

To round up the prosecution's case evidence was adduced that on 10 April 1992 there was a Cathay Pacific flight, CX 720 for Hong Kong at 10.55 a.m. Only one passenger was off loaded from that flight and that was the accused who was off loaded at the request of Sergeant Fan. This was the evidence of PW13, an airport services-supervisor with Cathay Pacific Airways who was on duty at Gate 12 for the flight to Hong Kong. The confirmed manifest of the passengers of Cathay Pacific Airways who took that flight to Hong Kong (P24B) was produced in Court.

At the close of the case of the prosecution I found that a *prima facie* case in the sense mentioned in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265 had been established that the accused was on the date and time and place specified in

a the charge in possession of a jacket from which were recovered 3 bundles which contained 978.53 grammes of cannabis resin. Under s. 37(d) of the Act the accused is presumed, until the contrary is proved, that he knew the nature of the drug, i.e. that it was cannabis resin and since the amount of the cannabis is more than the prescribed amount in s. 37(da)(vii) he is presumed, until the contrary is proved, to have trafficked in it.

I called the accused to make his defence on the charge.

c The accused in his evidence stated that the coat belonged to an Iranian who called himself Ali Askari. According to him the man said he was taking the same flight as the accused to Japan. He said he met the man in the transit lounge at Gate 6. When there was an announcement for passengers to go Gate 12 the man said he wanted to go to the toilet and told him to hold on to his coat. The accused took it and waited for 5 minutes and when the man did not turn up the accused went ahead to Gate 12. He put the man's coat on his left arm and carried his own bag in the other hand. The accused said that at Gate 12 he put his luggage on "the checking" and he walked through the doorway and he was physically checked after which the coat was taken from him and checked. He said the man Corporal Jamaluddin checked the coat and felt something and asked him, "What is this?" He said he did not speak English but he understood the question and he answered, "I don't!" meaning that he did not know. He testified that he also said, "My friend! My friend! Just a moment!" By that he testified that he meant, "that it was not mine. I had just taken it from a friend. I asked the police to give me just a moment to bring my friend."

g He then left for the transit lounge at Gate 6 to look for Ali Askari and could not find him. He said that the police came and asked him if he had found his friend and he replied in the negative. He was asked to follow the police to Gate 12 where the coat was examined and something was taken out from the coat.

He said he made a cautioned statement to the police (P25).

Under cross-examination the accused denied that he was "frisked" after which he took out the coat and put it in his right hand.

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The cautioned statement contained a statement which was similar to his evidence in Court. There were discrepancies. He had stated in the statement that he had been here before. His evidence was that that was his first visit and his passport, a brand new passport, showed that. I am not prepared to say he was lying when he said this was his first visit here. In the cautioned statement he mentioned that when he came to Kuala Lumpur he stayed in an apartment and the owner of the apartment was Mehdi and that he paid RM15 for 2 nights. In his evidence he said he did not know the man's name and he said he paid RM20 for the stay. He explained these discrepancies by saying that that had happened a long time ago. Bearing in mind that he had given the departure time of his plane as being 9.55 instead of 10.55, I am inclined to think that these discrepancies arose from a lapse of memory and the discrepancies are minor.

But the accused did lie when he denied the signature in the search list was his although the evidence was that he had affixed it there and although it looked similar to the signatures which were in the cautioned statement and which he admitted were his. He also denied that the signature on the Immigration card (which was stapled to his passport) was his although it looked similar to his signatures in the cautioned statement.

The accused's evidence that he was not wearing the jacket when he approached Gate 12 and that he had it over his left hand is contradicted by the evidence of security officer, Corporal Jamalluddin, and police Sergeant Fan that the accused was wearing a jacket and that he took it off and held it in his right hand. There was, however, a discrepancy between the evidence of Corporal Jamalluddin who said that the accused held the jacket while he examined it and the evidence of Sergeant Fan who said the accused handed the coat to Jamalluddin for examination.

While there was no dispute that the accused said "My friend! My friend!" When he was asked by Corporal Jamalluddin, "What is inside the pocket?" Corporal Jamalluddin denied that the accused also said "I don't" before he said, "My friend! My friend!" and that after these latter words "Just a moment!". Under cross-examination Sergeant Fan did agree that the accused uttered all these words which he said he uttered but under re-examination he disagreed with that.

a These discrepancies to my mind are disquieting especially when viewed against another aspect of the prosecution evidence. There was evidence that the accused was physically examined while he was still wearing his jacket. If that was so it is difficult to see why the physical examination of the person, which must have taken a few seconds, did not extend to the jacket while he was wearing it. It is unfortunate that, assuming the search was recorded on the master video tape, that the tape is not available, to verify what occurred on that day; it was destroyed by the fire which occurred at the airport on 15 October 1992. To my mind there is a reasonable doubt as to whether the accused was at all wearing the jacket.

c Corporal Jamalluddin when asked what he had in mind when the accused said, "My friend! My friend!", answered candidly, "As if he was looking for a friend." There was no evidence that the accused ran away from Gate 12. The evidence was that he walked out of Gate 12 hastily. Could he have gone to look for Ali Askari?

d The name of Ali Askari does not appear in the final manifest of passengers who boarded the Cathay Pacific Flight CX 720 for Hong Kong. The accused had testified that the man had called himself Ali Askari. If indeed he existed and he intended the accused to take the jacket through the check point would he have given the accused his real name? There is no evidence that the accused identified each and every passenger on that flight. The accused did say in his cautioned statement that after his arrest (see P25, page 4, lines 49, 50, 51 and 52) he was brought to the examination place by an officer and there the officer asked passengers who wanted to board the plane whether they knew the accused but no one said he knew him. But of course the Court is not aware - there is no prosecution evidence to that effect - if other passengers had not already boarded the plane before the passengers in the room were asked to identify the accused. And there was no evidence to show that no other Iranian passenger had come after the accused to be checked at Gate 12.

e I do have some doubts that the accused was telling the truth when he gave his version of what occurred at the checkpoint but I am reminded that the burden of proof is always on the prosecution, that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. In

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Mohamad Radhi b. Yaakob v. Public Prosecutor, [1991] 3 MLJ 169 the Supreme Court had this to say:

We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. Public Prosecutor* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

I cannot say I am satisfied that the explanation of the accused has not cast a reasonable doubt on the prosecution's case. And the accused is therefore acquitted and discharged.

**RE: SOH AH WAH; EXPARTE:
DEVELOPMENT & COMMERCIAL
BANK BERHAD**

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[BANKRUPTCY NO. D2-29-4382-90]
30 MARCH 1992

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PRACTICE & PROCEDURE: Application to rescind and annul adjudication and receiving orders - When affidavit verifying truth of creditor's petition should be filed - Whether adjudication and receiving orders can be made on debt of uncertain amount - Whether any oppression or extortion by judgment creditor - Whether any abuse of the process of Court by judgment creditor to obtain a collateral advantage - Consideration of r. 26 of the Companies (Winding-up) Rules 1972 - r. 106 & r. 108 of the Bankruptcy Rules 1969.

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This was an application to annul and rescind adjudication and receiving orders made against the judgment debtor on 5 August 1991.

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The debtor's liability arose from a guarantee executed in favour of the judgment creditor. Summary judgment under O. 14 of the Rules of the High Court 1980 (RHC 1980) was granted against the debtor and principal borrower but a stay of execution was granted to the principal borrower by reason of the principal borrower's counterclaim against the judgment creditor. The debtor contended that the creditor's petition was filed against him to compel him to use his influence with the principal borrower to withdraw the counterclaim against the judgment creditor. Correspondence between the parties averred to the withdrawal of the principal borrower's counterclaim as being one of the conditions allowing the debtor time to settle. 3 days before the hearing of the petition the judgment creditor had faxed a draft letter to the debtor to be issued by the principal borrower indicating the principal borrower's intention to withdraw its counterclaim. The judgment creditor explained that in order to obtain their agreement to an adjournment of the creditor's petition, the debtor stated he would try to get the principal borrower to withdraw its counterclaim and the faxed draft letter was the result of the debtor's oral promise. At the hearing of the creditor's petition, Counsel for the petitioning creditor indicated that the judgment creditor had received RM140,000 from the debtor and the adjudication and receiving orders were made on the outstanding balance of RM290,000.

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